In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 777/2001
(Old No. 1425 of 1991)

Raghubir Singh S/o Ajab Singh
R/o Village Thirpak, Patwari Circle,
Mangroli, Tehsil Karanprayag,
District Chamoli ….Appellant.

Vs.

State …Respondent.

Sri Rajendra Kotiyal, learned counsel for the appellant.
Sri D.K.Sharma, learned G.A. for the State.

Coram: Hon'ble P.C. Verma, J.
Hon'ble B.C. Kandpal, J.

Dated: 24-02-2006

(Per: Hon'ble B.C. Kandpal, J.)

Present appeal has been preferred by the appellant against the judgment and order dated 28.06.1991, passed by the Sessions Judge, Chamoli in S.T. No. 7/1991, thereby convicting the accused/appellant under Section 302I.P.C. and sentencing him to imprisonment for life.

2. Brief facts of the case are that on 23-9-1990 Kedar Singh, Pradhan of village Thirpak, lodged written report with Patti Patwari, Mangroli informing that on the Ghaat-Nandprayag motor road near Nirbal Warg Awas the dead body of Sajan Singh S/o Raghunath Singh was lying on the road and requested to take necessary action in the matter. Sri Vishambhar Dutt Thapliyal patwari on receipt of the written report went at the spot and held inquest on the dead body. He prepared inquest report Ext. Ka.5. The I.O. also prepared site plan, Ext. ka.6 of the place, where the dead body was lying. He sealed the dead body, wrote letter to C.M.O., Ext. Ka.7, prepared sample seal in three copies, Exts. Ka. 8 to 10, prepared sketch of dead body, Ext. ka.11 and sent it for post mortem. The I.O. recorded statements of various

witnesses and also took in to possession the written statement of Prem Singh, Ext. Ka.12, which allegedly given by him before the Pradhan, P.W.2, Kedar Singh. He also prepared check F.I.R., Ext. ka.13. on the basis of the written F.I.R. , Ext. Ka.2. Thereafter he registered a case in the general diary at report No. 58 dated 24-9-90 under Section 302/201 I.P.C. against the accused Raghubir Singh, the relevant G.D. entry is Ext. Ka.14. On interrogation the accused Raghubir Singh got recovered an iron rod from near the place of occurrence and the I.O. prepared recovery memo Ext. Ka. 16. On completion of the investigation, he submitted charge sheet, Ext. Ka.17 against the accused.

3. On committal of the case to the Court of Sessions, the learned Sessions Judge framed charge under Section 302 I.P.C. against the accused. He pleaded not guilty and claimed to be tried.

4. The prosecution in order to bring home guilt against the accused, examined in all six withesses.

5. P.W.1, Dr. Vinod Kumar Dhaundiyal, has conducted autopsy on the dead body of the deceased. In the opinion of the doctor death of the deceased had occurred two days prior, the dead body was average built, rigor mortis was passed in the lower limbs, eyes and mouth were closed, and the tongue was in between the teeth. He has found the following ante-mortem injuries on the person of the deceased:-

(i) Lacerated wound on occipital region, 15cm x 10cm x brain deep (grey matter was coming out through the wound).

(ii) Lacerated wound on left side of fore head 5cm x 3cm x bony deep.

(iii) Contusion present on anterior side of chest and neck.

(iv) Fracture of the lower and upper incisor teeth.

(v) Contusion of left side of abdomen 5cm x 3cm in size.

On internal examination, the medical officer found that the skull was fractured. Occipital bone and left parietal bone were fractured. Membranes were congested and fractured under injury Nos. 1 and 2. Brain was also congested and was fractured under injury Nos. 1 and 2. 3rd, 4th, 5th, and 6th ribs of right side were fractured. Larynx was congested. Right and left lungs were fractured. There was semi-digested food and gases were present in the intestine. In the opinion of the doctor the death of the deceased had occurred due to shock and haemorrhage, as a result of ante-mortem injuries. He has proved post mortem report, Ext. Ka.1.

6. P.W.2, Kedar Singh is the informant. He has lodged the first information report about the dead body lying on the road. He proved the F.I.R., Ext. Ka.2. He was a panch witness also with regard to the inquest of the dead body.

7. P.W.3 Balwant Singh has stated that on 22-9-1990 on the invitation of accused he went at the shop of accused Raghubir Singh to take fish where Sajan Singh (deceased) and Prem Singh were sitting. He also deposed that in his presence some altercation had taken place between the deceased and the accused. After some time he came back to his shop.

8. P.W.4, Rajan Lal has deposed that he used to catch fish from the river and use to go to the river downwards from the shop of the accused. On the day of

the incident he had gone to cath the fish and at about 9 p.m. he saw Raghubir Singh accused coming upward from Harijan Nirbal Awas. This witness told that at that time he had no talks with the accused.

9. P.W.5, Ved Prakash Singh was posted as S.D.M. Karanprayag at the time of the incident. This witness had recorded the statement of witness Prem Singh under section 164 C.r.P.C. This witness has proved the statement of Prem Singh, Ext. Ka.3. He also deposed that he had sent the statement to the court of C.J.M. on 9-10-1990 vide his letter Ext. Ka.4.

10. P.W.6, Visambhar Dutt Thapliyal, is the I.O. of the crime. He has narrated the steps taken by him during investigation and proved the prosecution papers as stated above.

11. The accused in his statement U/s 313 Cr.P.C. denied the prosecution case and stated that he has been falsely implicated in the crime on the pressure of the Patwari. He adduced no evidence in his defence.

12. The learned Sessions Judge, on evaluation of the prosecution evidence and after hearing the arguments of the parties, came to the conclusion that the prosecution was successful in proving its case against the accused beyond all reasonable doubts and he accordingly convicted and sentenced the accused/appellant under Section 302 I.P.C. as aforesaid.

13. Feeling aggrieved, the accused/appellant has come up in appeal before this court.

14. We have heard the learned counsel for the parties and perused the evidence on record.

15. It is to be seen by us whether the prosecution has established the guilt of the accused/appellant beyond reasonable doubt or not and for reaching to a definite conclusion the evidence available on record is to be scrutinized thoroughly.

16. First Information Report in this case was lodged on 23.09.1990 by Pradhan Gaon Sabha which reveals that the dead body of Sajan Singh was lying on the road and nobody is named in the report. It is important to mention here that on the basis of this report, *Patwari* who is the Investigating officer of this case came at the spot on 23.09.1990 and prepared the inquest of the dead body. Thereafter, the Investigating Officer started the investigation of this case and during the investigation on 24.09.1990; Investigating Officer recorded the statement of one Prem Singh who disclosed the name of the accused as Raghubir Singh. Thereafter, the Investigating Officer lodged the report against the accused on 24.09.1990 at 04:30 a.m.

17. The prosecution produced P.W.2 – Kedar Singh, P.W.3 – Blawant Singh, P.W.4 Rajan Lal, P.W.5 Ved Prakash Singh in the oral evidence. P.W.2 Kedar Singh has only deposed that he knows Raghubir Singh – accused as well as Sajan Singh – deceased. He ahs also stated that he saw the dead body of Sajan Singh on 23.09.1990 and identified deceased Sajan Singh. He has also stated that the inquest was prepared in his presence and he was made one of *Panchas* in the inquest report.

18. Further P.W. 3 – Balwant Singh has stated that he knows Raghubir Singh – accused as well as Sajan Singh deceased. He has stated that on 22.09.1990 Raghubir Singh came to his shop and purchased a cigarette. Thereafter, Raghubir Singh asked him that he has prepared a fish and he should also accompany him to take fish. Thereafter, this witness went with Raghubir Singh for eating fish. This witness has further deposed that at the house of Raghubir Singh, Prem Singh and the deceased Sajan Singh were sitting. He has also stated that all these persons after having liquor started creating nuisance and he left all these persons at the house of Raghubir Singh after taking fish. This witness has stated only that Sajan Singh deceased was lastly seen in the company of Raghubir Singh at the house of Raghubir Singh and the another person Prem Singh was also present over there.

19. Again P.W. 4 Rajan Singh has deposed that he saw Raghubir Singh on 22.09.1990 at 09:00 p.m. but he did not talk to Raghubir Singh. This witness has stated nothing more than this. Therefore, on the basis of the oral testimony of the witnesses produced by the prosecution, there cannot be much more evidence available on the record except that the deceased was lastly seen in the company of the accused/appellant Raghubir Singh in the night of 22.09.1990.

20. The most important aspect in this case is the statement of Prem Singh. This witness is a person who had been lastly seen in the company of the deceased as well as of the accused in the night of 22.09.1990. The statement of this witness was recorded on 24.09.1990 by the Investigating Officer and further his statement under Section 164 Cr. P.C. was also recorded by the Sub-

Divisional Magistrate on 08.10.1990. However, this witness was not produced before the court for his cross-examination.

21. It is pertinent to mention here that on 23.09.1990 when the dead body of Sajan Singh was found and the inquest was prepared at the spot, this witness Prem Singh was also present. It is evident from the statement of Prem Singh recorded under Section 164 Cr. P.C. that he had gone to that place on 23.09.1990 where the dead body of Sajan Singh was lying.

22. The inquest report shows that the reason for the death of Sajan Singh could not be disclosed by that time i.e. on 23.09.1990. The inquest on the body of the deceased started on 23.09.1990 at 09:50 a.m. and it concluded on 23.09.1990 at 03:00 p.m but during this period nothing could be disclosed by any of the witnesses with regard to the material pertaining to the cause of death of Sajan Singh. This fact becomes important especially under the circumstance that Prem Singh who disclosed the name of Raghubir Singh as an accused in this case on 24.09.1990 was present at the scene where the dead body was lying on 23.09.1990, but for the reasons best known to this witness Prem Singh, the name of the accused was not disclosed by him. Keeping silence by this material witness with regard to the cause of death of Sajan Singh for two days creates a serious doubt on the genesis of the prosecution case.

23. Learned G.A. has emphatically argued before us that there is a statement of witness Prem Singh recorded under Section 164 Cr.P.C. and in this statement Prem Singh has supported the prosecution case by saying therein that it was the accused/appellant

Raghubir Singh was assaulted Sajan Singh by *Saria* on his head due to which he succumbed to injuries. Thereafter, Raghubir Singh also threatened him with dire consequences and he on account of that fear could not disclose this fact to anyone.

24. We cannot appreciate the argument advanced by the learned G.A. counsel for the State as the prosecution could not disclose any reason as to how the fear of this witness could be over immediately on the next day i.e. on 24.09.1990 when the Investigation of the case started. The prosecution also could not show any sufficient reason as to why this witness could not disclose the name of accused Raghubir Singh on 23.09.1990 and what development actually took place for overcoming the fear of witness Prem Singh within next 24 hours.

25. Now, coming to the point of the statement of Prem Singh recorded under Section 164 Cr.P.C., we again find ourselves in complete disagreement with the submission advanced by the learned G.A. The statement recorded under Section 164 Cr.P.C. is nothing special more than the statement recorded of a witness under Section 161 Cr.P.C. The person whose statement under Section 164 Cr.P.C. has been recorded has necessarily to appear before the court for his cross-examination in order to examine the veracity of his statement. The statement under Section 164 Cr.P.C. is not a substantive evidence as it can be used to corroborate the evidence of a witness or to contradict him.

26- In this case, the statement of witness Prem Singh recorded under Section 164 Cr.P.C. appears to be result of an afterthought or advice therefore, to our mind

this statement may not weigh and we are suppose to act upon this type of statement without finding assurance from some other source as to the guilt of the accused/appellant.

27. In this case the statement of Prem Singh recorded under Section 164 Cr.P.C. does not find any corroboration from any other source as to the guilt of the accused/appellant. It is unsafe to rely upon such statement unless we are satisfied that such statement is true and voluntarily made and has been corroborated in material particulars.

28- It is also worthy to mention here that the Investigating Officer P.W. 6 Visambhar Dutt has categorically deposed in his evidence before the court that the statement of Prem Singh under Section 164 Cr.P.C. were recorded before the Sub-Divisional Magistrate and he in fact informed Prem Singh for recording his statement before the court. He has stated that he in fact did not take witness Prem Singh for recording his statement before the court of Sub-Divisional Magistrate. This part of the statement of the Investigating Officer finds absolute contradiction with the statement of P.W. 5 Ved Prakash Singh as this witness has stated that he was the Sub-Divisional Magistrate on 08.10.1990 and he recorded the statement of Prem Singh under Section 164 on that day. He has also stated that this witness Prem Singh was produced before him on that day by the *Patwari* (Investigating Officer).

29. In view of the aforesaid contradiction, we come to a definite conclusion that it would be absolutely unsafe to rely on this type of statement of a witness.

30. There is no other material evidence available on record connecting the accused with the commission of crime. No other circumstance, except the uncorroborated statement of witness Prem Singh recorded under Section 164 Cr.P.C. only is available on record.

31. On the basis of the assessment of evidence, we come to the conclusion that the prosecution has utterly failed in establishing the guilt of the accused/appellant under Section 302 I.P.C.

32. The evidence adduced by the prosecution in support of its case does not appear to be convincing and sufficient to warrant the conviction of the accused/appellant.

33. We, therefore, allow the appeal and set aside the conviction and sentence imposed by the court below vide judgment and order dated 28.06.1991 against the appellant. The accused/appellant is hereby acquitted of the charge levelled against him under Section 302 I.P.C.

(B.C. Kandpal, J.) **(P.C. Verma, J.)**

24.02.2006
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